Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-759

UNITED STATES OF AMERICA, *Petitioner,*

v.

DR. THOMAS W. MOORE, JR., *Respondent.*

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD BENNETT WILLIAMS
RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Counsel for Respondent

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

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Now comes the Respondent and files this Memorandum in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. It appears as Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Respondent believes that the question presented by the Petition is more properly stated as follows:

> Whether a duly licensed physician, registered under Section 822 of the Controlled Substances Act, 21 U.S.C. § 822, with the Bureau of Narcotics and Dangerous Drugs (BNDD) as a person authorized to prescribe methadone, is subject to prosecution under Section 841(a)(1) of the Act, 21 U.S.C. § 841(a)(1), for having "distribute[d], or dispense[d], a controlled substance".

The United States Court of Appeals for the District of Columbia Circuit, finding Section 841(a)(1) inapplicable to one who had been authorized pursuant to Section 822 to prescribe controlled substances, reversed Respondent's conviction. Respondent submits that the Court of Appeals correctly discerned the question presented and answered it properly.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Controlled Substances Act, 21 U.S.C. Section 801, *et seq.*, and of Title 21, Code of Federal Regulations, are set forth in Appendix C to the Petition.

STATEMENT

The Respondent, Dr. Thomas W. Moore, Jr., was convicted on twenty-two counts of violating 21 U.S.C. § 841. The original indictment against him had contained 639 counts. At the suggestion of the trial court,

a "manageable" group of counts, 40 in number, were selected for trial and the indictment was retyped accordingly. He was convicted on 22 of the 40 counts. On 14 of those counts, the trial court imposed concurrent 5-15 year sentences. On the other eight counts, said to relate to dispensing methadone to minors, the court imposed concurrent sentences of ten to thirty years, the latter sentences to be consecutive to those imposed on the other 14 counts. The total sentence imposed, therefore, was fifteen to forty-five years.[1] In addition, fines totalling $150,000 were imposed. And, at the time of sentence, all remaining counts were dismissed.

Each of the twenty-two counts of which Dr. Moore was convicted charged him, as to a specified person and time, with having "knowingly and unlawfully distributed and dispensed . . . a Schedule II narcotic drug controlled substance", to wit, a certain quantity of methadone.

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[1] Moreover, the court (a) imposed a "special parole" term of twelve years on each of the twenty-two counts, to run concurrently; and (b) revoked Dr. Moore's license to practice medicine in the District of Columbia pursuant to D.C. Code § 2-131. The statute authorizing revocation, D.C. Code § 2-131, provides an automatic stay pending appeal. The reversal of Dr. Moore's conviction automatically vacated the revocation.

The multiple sentences for counts said to involve minors were improperly imposed. The indictment did not allege the minority status of the patients, *United States* v. *Romero*, 249 F.2d 371 (2d Cir. 1957), nor did the jury make any special finding thereon. *Jordan* v. *United States District Court*, 233 F.2d 362 (D.C. Cir. 1956). In view of its disposition on the merits, the majority opinion in the court below did not reach this point; even the dissenting judge, however, agreed that the sentences were improperly aggregated. Petition, App. A, 48a, and fn. 15. In the event resentencing becomes necessary, Respondent will urge that the same considerations which invalidate the doubled sentence equally invalidate the consecutive nature thereof.

It was clear from the evidence that this was not a case of surreptitious drug-peddling, but rather one of a licensed physician, registered with the Attorney General under the appropriate statute as a person authorized to prescribe methadone, openly prescribing methadone to his patients. It was the prosecution theory, shared by the trial court, that the doctor could lawfully prescribe methadone only for detoxification and that 21 U.S.C. § 841 made it a crime for him to prescribe it either (1) avowedly to maintain methadone addiction in a patient who would otherwise be taking heroin,[2] or (2) purportedly to detoxify a patient, but by a method found by the jury to be not "in good faith . . . in accordance with a standard of medical practice generally recognized and accepted in the United States." Tr., October 20, 1972, 144 (see Petition, App. A, 5a 6a).

The facts which, Respondent concedes, the jury could have found beyond a reasonable doubt are that Dr. Moore, with respect to patients named in the indictment as well as others during the indictment period, including Government agents posing as patients, conducted himself more or less as follows:

1. He did not take all possible precaution to assure himself that the patients for whom he was prescribing methadone were in fact narcotic addicts. In some instances they were not.

[2] As to this, both the prosecutor and the trial court were clearly in error. Methadone maintenance was not proscribed by the statute or by any regulations then in effect. 21 C.F.R. § 306.04, the regulation relied upon by the government at trial (Petition, App. A, 5a) did not so proscribe. 21 C.F.R. § 130.44 did mandate certain pre-maintenance requirements which, we may assume, the Respondent did not meet—but, Section 130.44 did not become effective until after the events charged in the indictment.

2. He did not take all possible precaution to ascertain that the methadone he was prescribing was in fact being consumed by the patients for whom he prescribed it. In some instances they delivered their methadone to someone else.

3. His record-keeping was inadequate, in some instances, to record the quantity of methadone prescribed for a patient.

4. He prescribed methadone in quantities larger than the prosecution's expert witnesses thought proper for detoxification.

5. The fees he charged were graduated not in accord with the medical services rendered but rather in accord with the quantity of methadone prescribed. Petition, App. A, 4a.

Dr. Moore's testimony, which the jury was free to disbelieve, was that his purpose in prescribing methadone for his patients was to cure them of drug addiction. His theory, the inspiration for which he attributed chiefly to the experience of a British practitioner he claimed to have read about in the medical literature, was that cure depended upon methadone in such large quantities, varying from case to case, as might be required to achieve in the patient two conditions: (1) a physical condition of "blockade";[3] and (2) a psychological condition of strong desire for drug detoxification. According to that theory, if only enough methadone to achieve the first condition were taken, the subsequent "detoxification" by gradual diminu-

[3] "Blockade", according to an expert called by the defense, "means that you stuff a patient up with enough methadone so that the heroin he takes doesn't have any place to go but straight in and out . . . . I mean, whatever heroin did for the brain, it no longer does it at a certain X-level of methadone." Tr., October 18, 1972, 554-55.

tions of dosage would produce only temporary remission of the addiction. To achieve cure, however, the methadone dosage must be continued beyond "blockade", until the second condition has been achieved—in which the counter-craving for detoxification substitutes for the drug-craving. It was upon this theory that Dr. Moore justified his practice of allowing his patients' desires to determine the quantity of methadone he prescribed for them.[4]

REASONS FOR DENYING THE WRIT

In urging this Court to grant the writ, the government asserts that the case presents a question of statutory construction which is of substantial importance in enforcing the narcotics laws. The government goes on to assert that, if the decision of the court below stands, it will have immunized physicians from prosecution under Section 841(a)(1) of the Act and "will permit them to distribute narcotic drugs for clearly illegitimate purposes solely upon the basis of their statutory authorization to dispense narcotic drugs within the course of their legitimate professional practice." Petition, 9. Moreover, the government asserts the result reached by the Court of Appeals is at odds with that reached by other courts of appeals. Respondent will respond to these assertions in turn. In short, it is the Respondent's position (1) that the Court of Appeals was correct in its analysis of the statutory and regulatory scheme here at issue; (2) that any intra-circuit conflict is more illusory than real, the conflict

[4] As for his fee schedule, Dr. Moore's explanation was that his purpose in charging more for prescriptions of higher quantities was to make it uneconomical for his patients to peddle their methadone in the black market and, thus, to insure they consumed it themselves.

being in result rather than of analysis, none of the other circuits having undertaken the extensive statutory and regulatory analysis made by the court below: and (3) recent statutory and regulatory changes have, at one and the same time, (a) reinforced the conclusion reached by the court below and (b) made deregistration of errant physicians, and subsequent prosecution thereof, easier to accomplish.

1. The conclusion of the court below is correct and the court's reasoning clearly supports that conclusion. The court, in substance, held Section 841(a)(1) of the Act to be inapplicable to a licensed physician registered under Section 822 of the Act to prescribe methadont. Petition, App. A, 7a-10a. The court held further that the statutory scheme established by the Controlled Substances Act divided the universe of those controlled into two groups, those registered with BNDD and those not so registered. With respect to those registered, as long as the registration remained in force, their criminal liability was found in Sections 842 and 843 of the Act (not Section 841), with appropriate administrative sanctions up to and including revocation being found in Section 824 of the Act. With respect to those not so registered, the "pusher", the full panoply of severe criminal penalties were reserved. In short, a broad outline of the congressional intent showed a statute which dealt with registrants primarily through a system of administrative controls, relying on rather modest penalty provisions to enforce those controls, with the sanction of revocation for more serious violations. The severe penalties of Section 841 were reserved for those who sought to avoid regulation entirely by not registering. Petition, App. A, 1a, 8a-10a. The court correctly ascertained the congressional intent.

The statute under which Dr. Moore was indicted and convicted, 21 U.S.C. § 841, makes it a crime for a person to dispense methadone "except as authorized by this subchapter . . . ." Under § 822(b),

> "[P]ersons registered by the Attorney General under this subchapter to . . . dispense controlled substances are authorized to . . . dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

Dr. Moore, at all times, was duly registered with BNDD pursuant to Section 822 of the Act.

It follows therefore that Dr. Moore was exempt from prosecution *under § 841,* regardless of what the evidence showed him to have done. The statutory language impelling this conclusion is not a mere fortuity. That conclusion is impelled by the legislative history of the statute and by the whole statutory scheme.

The House Committee on Interstate and Foreign Commerce, in reporting out the bill which became the Controlled Substances Act, commenced its analysis of the legislation by pointing out the divergence of treatment of those authorized to deal in narcotics and those not so authorized:

> "The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." House Report No. 91-1444, 91st Cong., 2d Sess., Sept. 10, 1970, U.S. Code, Congressional and Administrative News (1970), p. 4569.

Thus, with regard to registrants, the intent of Congress was to subject them to *administrative regulation and control.* The penal sanctions applicable to misconduct by these "authorized" persons within the system of administrative regulation and control were specified in 21 U.S.C. §§ 842 and 843. The use of Section 841's more severe penal sanctions was reserved for *unauthorized* persons—those dealing in narcotics "outside the legitimate distribution chain . . .".

To effectuate its intent in respect of persons in the "legitimate distribution chain", Congress provided that they must register annually with the Department of Justice (Section 822(a)), and that, having so registered, they were "authorized" to deal with narcotics to the extent of their registration (Section 822(b)). To effectuate the system of administrative controls over registered doctors Congress authorized the Attorney General to conduct inspections of their offices. 21 U.S.C. § 822(f). The registrant, whose registration was granted in the first instance on a finding that he possessed a medical license authorizing him to dispense narcotic drugs (see 21 U.S.C. § 823(f)), thus operated under the vigilant eye to BNDD. The registrant is forewarned that any significant misconduct may trigger a revocation of his BNDD registration and license to practice medicine.

The basic theory of the prosecution was that, although Dr. Moore may have been an "authorized" person within the meaning of Section 841, "by his violation of these regulations [21 C.F.R. § 306.04] he violated 841(a) of the CSA." Petition, App. A, 5a-6a.

The threshold impediment to this theory is that although Congress, in 21 U.S.C. § 821, conferred upon

the Attorney General the power to promulgate regulations, it did not make violations of those regulations a crime. To the extent, therefore, that the conviction rested on violation of 21 C.F.R. § 306.04, it could not be sustained because, whatever administrative consequences may flow from such violations, no pronouncement of law had been violated to which Congress has attached any criminal penalty *United States* v. *Eaton,* 144 U.S. 677 (1892); compare *United States* v. *Grimaud,* 220 U.S. 506 (1911); and see the dissenting opinion of Mr. Justice Frankfurter in *Singer* v. *United States,* 323 U.S. 338, 350-351 (1945). As this Court said in *Viereck* v. *United States,* 318 U.S. 236, 241 (1943):

> "One may be subjected to punishment for crime in the federal courts only for commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

No such punishment was so authorized.

Equally as significant, Section 306.04 was included within Part 306 of the Regulations, the scope of which was stated in Section 306.01:

> "Rules governing the issuance, filling and filing of prescriptions pursuant to . . . (21 U.S.C. 829) are set forth generally in that section and specifically by the sections of this part."

Section 306.04, therefore, whatever its provisions may mean, is no more than a specification of the general provisions of Section 829 of the statute. The penalty for a violation of Section 829 of the Act is specified in Section 842, *not Section 841,* and it ranges between a mere civil money penalty and a maximum criminal

penalty of one year imprisonment plus a fine. Clearly, the violation of a regulation issued pursuant to Section 829 of the Act can arise to no higher dignity than a violation of that statutory provision itself. There is not even a statutory ambiguity suggesting that the prosecutor is free, by electing to prosecute the violation under Section 841, to multiply the maximum penalty for a violation of Section 829 by a factor of fifteen or thirty, as was done here. Moreover, even if there were some ambiguity as to which of the two penal sections —Section 841 or Section 842—applied to a violation of Section 829, ambiguity would have to be resolved in favor of Section 842, because (1) it is the more specific statutory provision, *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961), *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-29 (1957), *Ginsburg & Sons* v. *Popkin,* 285 U.S. 204 (1932); and (2) it provides the lesser penalty. *Bell* v. *United States,* 349 U.S. 81, 83 (1955). The court below correctly so concluded. Petition, App. A, 2a. And it was eminently correct in its conclusion that Dr. Moore, being a registrant within the meaning of Section 822, was not subject to the felony provisions of Section 841 for acts done within and during the course of his registration.

2. The Petition asserts that the "result reached by the court of appeals conflicts with the decisions of the other courts of appeals that have considered the issues . . .". Petition, 14. While it is true that other courts of appeals have sustained the convictions of physician-registrants for violating Section 841(a)(1), the opinion of the court below is the first to have examined in detail the interplay of the registration provisions of Section 822 and the criminal penalties

imposed by Section 841(a)(1). Thus, for example, among the cases referred to by the government as being at odds with that of the court below is *United States* v. *Bartee,* 479 F.2d 484 (10th Cir. 1973). In *Bartee,* however, the court's conclusion rested upon an agreement between the parties which, in effect, removed Section 822 from the court's consideration, and a concession by counsel for the defendant that, in effect, foreclosed the issue. *Id.,* at 488. One of the other cases said to be in conflict, *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973), relies solely upon *Bartee,* 487 F.2d at 208, as does *United States* v. *Jobe,* 408 F.2d 268 (10th Cir. 1973). In yet another case, *United States* v. *Collier,* 478 F.2d 268 (5th Cir. 1973), the statutory analysis was not considered, presumably because the defendant asserted only the vagueness of Section 841(a)(1) as applied to registered physicians, argued that the Tenth Amendment removed from the federal government the power to control medical practice, asserted that Section 841(a)(1) violated the constitutional presumption of innocence and that it created cruel and unusual punishment for physicians. Only in *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973), did the court come to grips precisely with the interplay of Section 822's registration provisions and the felony provisions of Section 841(a)(1) and the analysis in *Badia* is cursory at best.

Thus, while it may be accurate to say that the conclusions of the *Badia, Bartee, Collier, Jobe* and *Leigh* courts are at odds with that reached by the court below, the court in the instant case "respond[ed] to a line of reasoning which was not explored in any of these cases". Petition, App. A, 18a, fn. 51. In view of the fact that, for the first time, a complete statutory and

regulatory analysis has been judicially undertaken, this Court may consider plenary review to be premature. To the extent that similar cases may now be in the judicial process,[5] the Court may feel that further exploration by appellate courts in light of the opinion of the court below is a more orderly way to proceed.

3. The foregoing analysis finds support in the recently enacted Narcotic Addict Treatment Act of 1974, P. L. 93-281, 93rd Cong., 2nd Sess. That Act, at one and the same time, enforces the original congressional scheme in the Controlled Substances Act to require the registration of those within the legitimate delivery chain and to punish severely those operating outside registered channels, and eases the government's burden in deregistering those who abuse their registration. Specifically, the Act amends Section 823 of the Controlled Substances Act, 21 U.S.C. § 823, to provide for the specific registration of those dispensing narcotic drugs *either* for maintenance *or* detoxification purposes and amends Section 304 of the Controlled Substances Act, 21 U.S.C. § 824, by specifically providing for easier deregistration of those guilty of misconduct, thereby placing them outside the regulated scheme and amenable to the more severe penalties provided by Section 841 of the Controlled Substances Act, 21 U.S.C. § 841. This intent, although readily divined from the precise language of the Narcotic Addict Treatment Act of 1974 itself, is made even more clear by the accompanying report of the Interstate and Foreign Commerce Committee of the House of Representatives. H. Rep. 93-884, 93rd Cong., 2nd Sess., March 7, 1974. That Report notes the purpose of the bill: "The bill defines

[5] Respondent is aware of none (save that noted in Petition, 13, fn. 17) and the Petition offers no enlightment on this issue.

what is meant by the terms 'maintenance treatment' and 'detoxification treatment', and requires separate DEA [6] registration for practitioners who dispense narcotic drugs to individuals for maintenance treatment, detoxification treatment, or both." U.S. Code Congressional and Administrative News (1974), Adv. No. 5, 1073, at 1076-1077. The Report goes on to consider deregistration and the result thereof.

> "In order to qualify for registration the applicant must demonstrate that he can fulfill, and will observe, the medical standards of FDA and the security and diversion standards determined by DEA. Applicants must comply with standards established by FDA (after consultation with DEA) respecting the quantity of narcotic drugs for unsupervised use provided to individuals enrolled in treatment. As with other medical matters, the setting and use of this 'take home privilege', is a matter best determined by the Department of Health, Education, and Welfare, after consultation with the Department of Justice. *The bill further provides that DEA may suspend or revoke a registration for failure to comply with the standards set forth by FDA or DEA.* The suspension or revocation of the registration will not be general. It will apply only to the registration under which the violation of the standards occurred and have no prejudgment effect on any other registration which the practitioner may hold. This provision will clarify and facilitate the law enforcement options available to DEA. *The activities of unregistered persons would be placed in the same legal category as those of any other illicit traffickers.* Proof of guilt of such activities would constitute *prima facie* violation of the felony

[6] The Drug Enforcement Administration is the successor to the Bureau of Narcotics and Dangerous Drugs.

> statutes. This would be true regardless whether lack of registration is a result of failure to apply for registration, failure to be granted approval, or suspension or revocation of a prior approval." *Id.* (Emphasis supplied)

Perhaps more importantly, in describing the deregistration provisions of the new Act, and the manner in which they affect deregistration under the Controlled Substances Act, the House Report reads as follows:

> "Under current law, the registration of a practitioner can only be revoked if he does not have a State license, has been convicted of a felony, or has fraudulently applied for registration. This has made it difficult for the Attorney General to take action in those instances in which he believed that a treatment program or detoxification program was not being properly conducted. This new subsection provides that in such instances, the Attorney General may immediately revoke or suspend the registration of any practitioner who does not meet the standards set forth in section 303 (g)." *Id.*, at 1079.

Thus, the new Act recognizes what the Congress has all along intended and what the court below quite properly discerned—that the universe of those controlled is divided into registrants who are, and continue to be, subjected to administrative sanctions and less severe criminal penalties, and non-registrants who are subject to the more serious criminal penalties provided for narcotics traffickers. Moreover, it eases the governments burden in deregistering those thought to have abused their registration, thus rendering them more amenable to these more serious criminal penalties if they persist in their actions.

To this extent, the new statute underscores and validates the interpretation given the Controlled Substances Act by the court below and, to the extent that the opinion of the court below either created or recognized the existence of problem areas for enforcement of the earlier statute, the new Act treats with many of them.

The Respondent submits that, viewing the opinion of the court below in light of the recently enacted Narcotic Addict Treatment Act, the Court may be dealing with an issue affecting so few cases in the past (and presenting an issue unlikely to arise in the future) as not to commend itself to plenary review at this time. In Respondent's view, the Narcotic Addict Treatment Act of 1974 with it enhanced registration requirements and deregistration provisions, solves the problems which the Petition suggests were created "in the enforcement of the federal narcotics laws" by the opinion of the court below. Petition, 9.

CONCLUSION

In light of the foregoing, the Respondent respectfully submits that the petition should be denied.

EDWARD BENNETT WILLIAMS
RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Counsel for Respondent

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

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